AMMB Factors Sdn Bhd v Poh Ting Kuwi

HIGH COURT (KUALA LUMPUR) — SUIT NO D5–22–1983 OF 1998
KANG HWEE GEE J
13 OCTOBER 2000

Civil Procedure *— Affidavits — Affidavit in reply — Time limit for filing and service — Affidavit in reply must be filed and served on the other party within 14 days from date on which affifavit he intends to reply was served on him — Whether 14 days rule applies only to the first affidavit in reply to a summons in chambers or to all other subsequent affidavits — Rules of the High Court 1980 O 32 r 13 (2) (b)*

The plaintiff had entered judgment in default of appearance against the defendant. The defendant later applied to set aside the judgment in default of appearance which was opposed by the plaintiff. The defendant raised a preliminary objection to the admission of two affidavits which the plaintiff had filed as replies to the defendant's affidavits in reply, on the ground that they were filed and served on the defendant later than l4 days contrary to O 32 r 13(2)(b) of the Rules of the High Court 1980 ('RHC'). The preliminary objection was allowed and consequently the senior assistant registrar disregarded the two affidavits of the plaintiff and hence the appeal. The issue was whether O 32 r 13 (2)(b) of the RHC applies only to the first affidavit in reply to a summons in chambers or to all other subsequent affidavits in which a party may wish to file in the proceedings.

Held, dismissing the appeal:

(1) The purpose for which of O 32 r 13(2) of the RHC was framed was to alleviate the filing and serving of an affidavit by a party at the eleventh hour, an act which would invariably cause the proceedings before the judge to be postponed merely to allow counsel for the other party to read and prepare, if necessary, any further affidavit in reply. A purposive interpretation therefore requires a ruling that the 14 days rule apply to all affidavits which a party intends to reply to, be it an affidavit in reply or any subsequent affidavits in the proceedings. Any interpretation to the contrary would be an impediment to the purpose for which the rule was framed (see pp 355B–C); *Majlis Daerah Dungun v Tenaga Nasional Bhd* [1998] 1 MLJ 708 not followed (p 355G).

(2) Order 32 r 13(2)(b) of the RHC is clear and unambigious. The rule provides for a party wishing to reply to 'affidavit', that is to say any affidavit to be used in the summon in chambers. The language is clear. The subrule applies to all affidavits, whether an immediate affidavit in reply or any subsequent affidavits which the deponent intends to reply to. Order 32 r 13(2)(b) of the RHC could not have been any clearer by its use of the words 'wishing to reply to an affidavit' to express the intention of the rules committee, that it is meant to apply not only to the affidavit in reply but also to any subsequent affidavits which an opponent may have served on the party wishing to reply. No further qualifying expression is therefore necessary (see p 354C–E).

(3) Order 32 r 13(1) of the RHC is concerned with the giving of 'notice to every other party' of the intention of a party to use an affidavit filed by him in the proceedings in chambers. Order 32 r 13(2) of the RHC, on the other hand, is concerned with the imposition of a time limit on the filing and service of the affidavit to be used in such proceedings in chambers. The two subrules therefore are meant to serve different functions. Save that the effect of both the subrules serve to alert the other party of the impending use of the affidavit being filed, there is no nexus between O 32 r 13(1) and r 13(2) as to require that they be harmonized to give effect to the purport of r 13 as a whole (see p 354E–F).

[**Bahasa Malaysia summary**

Plaintif telah mencatat penghakiman ingkar kehadiran terhadap defendan. Defendan kemudiannya telah memohon untuk mengenepikan penghakiman ingkar kehadiran, dan ini ditentang oleh plaintif. Defendan telah membangkitkan bantahan permulaan terhadap dua afidavit jawapan plaintif yang menjawab afidavit jawapan defendan kerana afidavit-afidavit tersebut telah difailkan dan disampaikan ke atas defendan selepas tempoh masa 14 hari, bertentangan dengan A 32 k 13(2)(b) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Bantahan permulaan tersebut dibenarkan dan penolong kanan pendaftar seterusnya tidak menghiraukan afidavit-afidavit plaintif tersebut. Plaintif merayu. Isu di sini adalah sama ada A 32 k 13(2)(b) KMT digunakan untuk afidavit jawapan kepada saman dalam kamar yang pertama, ataupun digunakan untuk afidavit-afidavit seterusnya yang mungkin difailkan di dalam prosiding.

Diputuskan, menolak rayuan tersebut:

(1) Aturan 32 k 13(2) KMT digubal untuk mengurangkan pemfailan dan penyampaian afidavit oleh suatu pihak pada saat-saat yang akhir, yang mungkin menyebabkan tundaan prosiding dihadapan hakim untuk membolehkan peguam pihak yang lain membaca dan menyediakan, jikalau perlu, afidavit jawapan selanjutnya. Mengunakan tafsiran bermaksud, tempoh masa 14 hari digunakan untuk segala afidavit di dalam prosiding yang hendak dijawab, sama ada afidavit jawapan atau afidavit selanjutnya. Tafsiran yang berlainan hanya merupakan penghalang kepada tujuan kaedah tersebut digubal (lihat ms 355B–C); *Majlis Daerah Dungun v Tenaga Nasional Bhd* [1998] 1 MLJ 708 tidak diikut (355G).

(2) Aturan 32 k 13(2)(b) KMT adalah jelas. Kaedah tersebut digunakan untuk pihak yang ingin menjawab 'afidavit', iaitu mana-mana afidavit yang hendak digunakan dalam saman dalam kamar. Bahasa yang digunakan adalah jelas. Sub-kaedah digunakan untuk semua afidavit, sama ada afidavit jawapan yang segera ataupun afidavit-afidavit selanjutnya yang hendak dijawab.

Aturan 32 k 13(2)(b) KMT tidak mungkin lebih jelas dalam pengunaan perkataan-perkataan 'yang ingin menjawab afidavit' untuk menyatakan niat jawatankuasa kaedah, iaitu ia digunakan untuk afidavit jawapan dan juga kepada afidavit-afidavit selanjutnya yang disampaikan oleh pihak yang bertentangan ke atas pihak yang berniat untuk menjawabnya. Pernyataan kelayakan yang lain tidak diperlukan (lihat ms 354C–E).

(3) Aturan 32 k 13(1) KMT adalah berkenaan dengan pemberian 'notis kepada pihak-pihak yang lain' mengenai niat suatu pihak untuk mengunakan afidavit yang difailkannya dalam prosiding dalam kamar. Aturan 32 k 13(2) KMT pula berkenaan dengan pengenaan had masa ke atas pemfailan dan penyampaian afidavit yang digunakan di dalam prosiding dalam kamar. Oleh itu, kedua-dua sub-kaedah mempunyai fungsi yang berlainan. Melainkan tujuan kedua-dua sub-kaedah memberi amaran kepada pihak yang lain bahawa afidavit yang difailkam akan digunakan, tiada perhubungan diantara A 32 k 13(1) dan k 13(2) KMT yang memerlukan kedua-dua sub-kaedah ini diharmonikan untuk memberi kesan kepada tujuan k 13 secara keseluruhan (lihat ms 354E–F).]

Notes

For cases on affidavits, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 219–293.

Cases referred to

Kesultanan Pahang v Sathask Realty Sdn Bhd [1997] 2 CLJ 723 (refd)
Majlis Daerah Dungun v Tenaga Nasional Bhd [1998] 1 MLJ 708 (not folld)
Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] CLJ 1 (refd)
Syed Mubarak Syed Ahmad v Majlis Peguam Malaysia [2000] 3 CLJ 659 (refd)

Legislation referred to

Interpretation Acts 1948 and 1967 s 17A
Rules of the High Court 1980 O 32 r 13(1), (2)(b)

Kingston Tan (*Shereendar Kaur* with him) (*Hailey Hassan, Tan & Partners*) for the plaintiff.
CL Wong (*Wong Law & Assoc*) for the defendant.

Kang Hwee Gee J. :

The plaintiff, AMMB Factors Sdn Bhd's appeal in this case involves the pusine issue of whether O 32 r 13(2)(b) of the Rules of the High Court 1980 ('RHC') applies only to the first affidavit in reply to a summons in chambers or to all other subsequent affidavits in which a party may wish to file in the proceedings.

The question arose before the senior assistant registrar, before whom the plaintiff's counsel, Mr Kingston Tan, appeared to oppose the defendant's application to set aside the judgment in default of appearance entered against the defendant. At the hearing, counsel for defendant raised a preliminary objection to the admission of two affidavits which the plaintiff had filed as replies to the defendant's affidavits in reply, on the ground that they were filed and served on the defendant later than l4 days contrary to r l3(2)(b).

The preliminary objection was allowed and consequently the senior assistant registrar disregarded the two affidavits of the plaintiff which were filed after the l4 days period. Hence this appeal.

Rule 13 reads as follows:

> (1) Any party —
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> (a) filing an affidavit intended to be used by him in any proceedings in Chambers; or
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> (b) intendint to use in any such proceedings any affidavit filed by him in previous proceedings,
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> must give notice to every other party of the filing or, as the case may be, of his intention to do so.
>
> (2) Save as otherwise provided in these rules —
>
> (a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and
>
> (b) a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

Mr Kingston Tan maintained that the senior assistant registrar was wrong in interpreting that the 14 days rule applies to all affidavits in reply, for there is now a direct authority of the High Court in the case of *Majlis Daerah Dungun v Tenaga Nasional Bhd* [1998] 1 MLJ 708, which had decided otherwise.

Page 711G of the judgement reads:

> It is evident that by virtue of the phrase 'Save as otherwise provided in these rules appearing in sub-r (2), the application of the subrule does not apply to any provisions to the contrary, in particular to the procedure in sub-r (1) of r 13. Subrule (2) applies only to an affidavit in support of an application in chambers and to an affidavit in reply to the affidavit in support of such application but not to subsequent affidavit, otherwise the subrule would have provided so.

And at p 712A:

> However, to my mind, the purpose of the enactment can still be maintained because the procedure laid down in sub-r (1) appears to be expeditious and supplementary to the purpose of sub-r (2). That is the only construction that can be given to sub-r (2) in order to harmonise sub rr (1) and (2). Any other construction would result in the non-application of sub-r (1) under any circumstances and would lead to absurdity.

It would appear that the ratio for the ruling that the 14 days rule should apply only to 'the affidavit in reply to the affidavit in support of an

application in chambers, but not to subsequent affidavit' is based on the premise:

(i) that r 13(2) does not expressly provide that it was intented to apply to other subsequent affidavits filed by the parties and,

(ii) that r 13(2) had to be harmonized with the proceeding r 13(1), and that any other interpretation would result in absurdity.

The decision appears sound enough if only because r 13(2) does not expressly say that it was meant to apply to all affidavits intended to be used in the summons. But having scrutinized O 32 r 13 of the RHC in the process of hearing similar arguments in the past and having made rulings to the contrary, I must, with respect, say that I do not share the same sentiment expressed in that judgement for the following reasons:

1 Rule 13(2)(b) is clear and unambigious. The rule provides for a party wishing to reply to 'affidavit', that is to say any affidavit to be used in the summon in chambers. The language is clear. The subrule applies to all affidavits, whether an immediate affidavit in reply or any subsequent affidavits which the deponent intends to reply to.

Rule 13(2)(b) could not have been any clearer by its use of the words 'wishing to reply to an affidavit' to express the intention of the rules committee, that it is meant to apply not only to the affidavit in reply but also to any subsequent affidavits which an opponent may have served on the party wishing to reply. No further qualifying expression is therefore necessary.

2 Rule 13(1) is concerned with the giving of 'notice to every other party' of the intention of a party to use an affidavit filed by him in the proceedings in chambers. Rule 13(2), on the other hand, is concerned with the imposition of a time limit on the filing and service of the affidavit to be used in such proceedings in chambers. The two subrules therefore are meant to serve different functions. Save that the effect of both the subrules serve to alert the other party of the impending use of the affidavit being filed, there is no nexus between r 13(1) and r 13(2) as to require that they be harmonized to give effect to the purport of r 13 as a whole.

3 The purport of r 13(2)(b) is, by its language, so plain that it is hardly necessary in my view to embark on the task of interpretation — *absoluta sententia expositore non indiget* (It is not allowable to interpret what has no need of interpretation).

But even assuming that r 13(2)(b) is ambiguous — that on the face of it the words 'a party wishing to reply to an affidavit in r 13(2)(b)' can also be read to apply only to an affidavit in reply, then the ambiguity must be resolved by adopting a construction that would promote the purpose for which O 32 r 13 of the RHC has been formulated — on the same principle accorded to Acts of Parliament by s 17A of the Interpretation Acts 1948 and 1947 which read as follows:

> 17A. In the interpretation of the provision of an Act, a construction that . would promote the purpose or object underlying the Act (whether that

A purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

(See the purposive approach to interpretation being applied in *Syed Mubarak Syed Ahmad v Majlis Peguam Malaysia* [2000] 3 CLJ 659, and *Kesultanan Pahang v Sathask Realty Sdn Bhd* [1997] 2 CLJ 723).

B Few knowledgable practioners of law who have had to make constant references to the Rules of the High Court 1980 would deny that the purpose for which of r 13(2) was framed was to alleviate the filing and serving of an affidavit by a party at the eleventh hour, an act which would invariably cause the proceedings before the judge to be postponed merely to allow counsel for the other party to read and prepare, if necessary, any further affidavit in reply.

C The purpose for which r 13 was framed was accurately postulated in the judgement of Siti Norma Yaakob JCA in *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] CLJ 1 at p 5 in the following passage:

D We would like to add that O 32 r l3 (2) was added by way of an amendment to the RHC for the orderly disposal of applications in chambers and it came into effect on 1 August 1993. It sets out the time frame within which affidavits, intended to be used in proceedings in chambers either in support of or in reply to such applications, are to be filed and served thereby preventing any last minute filing and service of such affidavits which before the amendment would have neccessitated such applications being adjourned repeatedly thereby causing delay.

E In fact, the same conclusion was reached by his Lordship, Mohd Noor Ahmad J in *Majlis Daerah Dungun*, when he said at p 711:

F There is no doubt that the subrule was specifically enacted to eradicate the rampant abuse of process by malevolent, indolent or unpaid practitioners who had devised a fall-safe method of causing unwarranted delays by filing affidavit at the last minute (see *Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors* [1997] 1 MLJ 453 at p 470H); and that it may be argued that the interpretation that I have given to the subrule may once again give rise to the mischief that the enactment had intended to eradicate.

G Having known the objective of r 13(2), a purposive interpretation therefore requires a ruling that the 14 days rule apply to all affidavits which a party intends to reply to, be it an affidavit in reply or any subsequent affidavits in the proceedings. Any interpretation to the contrary would be an impediment to the purpose for which the rule was framed. The very purpose

H of requiring an affidavit in reply to be filed and served within 14 days itself would be rendered nugatory if subsequent affidavits can be filed and served later than 14 days. Surely that could not have been what the rules committee had intended.

The appeal on the preliminary objection of the plaintiff is dismissed.

I *Appeal dismissed.*

Reported by Benjamin Yong